2000

Combined Metals v. State Tax Commission : Brief of Respondent

Utah Supreme Court

UTAH SUPREME COURT

BRIEF

INDEX

CASES CITED

REFERENCES AND AUTHORITIES

In the
Supreme Court of the State of Utah

	Case No.
COMBINED METALS REDUCTION COMPANY	6869
EUREKA LILLY CONSOLIDATED MINING COMPANY	6870
TINTIC STANDARD MINING COMPANY	6871
COLORADO CONSOLIDATED MINING COMPANY	6872
CHIEF CONSOLIDATED MINING COMPANY	6873
MONTANA BINGHAM CONSOLIDATED MINING COMPANY	6874
UNITED STATES SMELTING, REFINING AND MINING COMPANY	6875
EUREKA BULLION MINING COMPANY	6876
INTERNATIONAL SMELTING AND REFINING COMPANY	6877
NATIONAL TUNNEL & MINES COMPANY	6878
OHIO COPPER COMPANY OF UTAH	6879

Plaintiffs and Respondents

vs.

STATE TAX COMMISSION and J. LAMBERT GIBSON, ROSCOE E. HAMMOND, MILTON TWITCHELL and HEBER BENNION, JR., constituting said Tax Commission.

Defendants and Appellants.

RESPONDENTS' BRIEF

I

STATEMENT OF THE CASE

For convenience, and in order to conform with the plan adopted by Appellants, Respondents will refer herein

to the Record in Case No. 6869, *Combined Metals Reduction Company* v. *State Tax Commission, et al.*

Appellants' "Statement of the Case" (Brief pp. 2-6) is inadequate for a clear understanding of the issues and omits facts which are not only material but, in view of the applicable statutes, are controlling.

By Chapter 101, Laws of Utah, 1937, (Sections 80-5-65, et. seq., Utah Code Annotated, 1943), which became effective on May 11, 1937, the Legislature of Utah imposed a Mine Occupation Tax upon all persons engaged in the business of mining or producing metalliferous ores, and the Appellant, State Tax Commission, was empowered to administer that Act. Thereby, every person engaged in the business of mining or producing ore containing gold, silver, copper, lead, iron, zinc or other valuable metals in the State of Utah was required to pay to the State of Utah, "an occupation tax equal to one per cent of the gross amount received for, or the gross value of, metalliferous ore sold," during the calendar year then next preceding. Appellants (Brief, p. 3) refer to the above portion of the Mine Occupation Tax Act, but they apparently deem surplusage or quite unnecessary to a presentation of their case the provisions of that statute next below quoted, which provide the method by which the "gross amount received for, or gross value of, metalliferous ore sold" shall be determined. Section 80-5-66, Utah Code Annotated, 1943, after providing as above indicated for the payment of an occupation tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold specifically provides the basis for computing the occupation tax thereby imposed.

"THE BASIS FOR COMPUTING THE OCCUPATION TAX IMPOSED BY THIS ACT FOR ANY YEAR SHALL BE AS FOLLOWS:

"(a) If the ore or metals extracted is sold under a bona fide contract of sale, the amount of money or its equivalent actually received by the owner, lessee, contractor or other person operating the mine or mining claim from the sale of all ores or metals during the calendar year less a reasonable cost, if any, of transporting the ore from the place where mined to the place where, under the contract of sale, the ore is to be delivered.

"(b) If the extracted ore is treated at a mill, smelter or reduction works which receives ores from independent sources and which is owned or controlled by the same interest owning or controlling the mine or mining claim, such disposal shall be treated as a sale within the meaning of this section for the purpose of determining gross proceeds or otherwise, and in such determination a rate or charge for sampling, assaying, milling and smelting the ores and extracting the metals and minerals therefrom shall be deducted which shall not exceed an amount to be determined by applying the same rates as are applied by such mill, smelter, or reduction works or competing works, to ores of substantially like character and in like quantities received from independent sources. In the event of controversy the tax commission shall have power to determine such rates or charges. Transportation charges may also be deducted as provided in subdivision (a) hereof.

"(c) If a mill or other reduction works is operated exclusively in connection with a mine, such mill or reduction works shall be treated as a part of the mine and the cost of operating such mill or reduction works shall, for the purpose of fixing the

> occupation tax imposed by this act, be regarded as part of the cost of mining and cost of assaying, sampling, smelting, refining, and transportation, only, shall be deducted.
>
> "An annual exemption from the payment of the occupation tax imposed by this act upon $20,000 in gross value of ore shall be allowed to each person, provided but one exemption shall be allowed for one claim or group of claims operating under one ownership as a mine."

Only sub paragraphs (a) and (b) supra of Section 80-5-66 are involved here.

It is further provided by the Act (Section 80-5-67, Utah Code Annotated, 1943) that every person engaged in the business of mining shall file with the Appellant, State Tax Commission, a statement setting forth, among other things, "the total amount received during the preceding calendar year from the sale of ore or metals," and the amount claimed by way of deduction for treatment charges and for transportation of the ores or metals sold "from the place where produced to the place sold."

The sole inquiry here is as to the total amount received by the several Respondents from the sale of ore and metals during the calendar year 1943.

The amount actually received by each Respondent during the year 1943 from the sale of its ores and metals is set out in Column 1, page 31, of the stipulation of facts herein (Rec. p. 73). Appellants admit that no other or greater amounts were received from or paid *by the purchaser.* The amount of subsidies received by each Respondent during

that year is set out in Column 2 at the same page and the gross proceeds assessed by the Appellant commission, which include subsidy payments received from the Metals Reserve Company, is set out in Column 3 of the same page of the record.

By Executive Order of the President No. 8734, promulgated April 11, 1941, as amended by the President's Executive Order No. 8875, promulgated August 28, 1941, (Vol. 9, U. S. Cong. Serv. 1941, pp. 852, 867) (R. 37-39) the President created in the Office for Emergency Management of the Executive Office of the President, an Office of Price Administration, at the head of which the President appointed an Administrator with authority to take all lawful steps necessary to prevent price spiralling and inflation, and among other things, to publish and declare maximum or ceiling prices of materials or commodities, and to enforce their observance. Pursuant to authority thus conferred, price schedules for copper were established August 12, 1941, (Price Schedule No. 15 by the Administrator, Office of Price Administration) (R. 39) and it was thereby provided, among other things, that no person should sell or offer to sell, buy or offer to buy, or accept delivery of copper at prices higher than the maximum of 12c per pound. And on January 13, 1942, the Administrator issued Price Schedule No. 69 (R. 42) which by provisions in large part identical with those of Schedule No. 15, fixed the maximum price for primary lead at 6½c per pound; and on January 28, 1942, the Administrator issued Price Schedule No. 81 (R. 43), which by provisions again in large part

identical with those of Price Schedule No. 15, fixed the maximum price for primary slab zinc at 8¼c per pound.

By Executive Order No. 9024 (Vol. 1 of Accu. Supp., Code of Fed. Reg. of the U. S. A., p. 1070) issued January 16, 1942, the President created within the Office for Emergency Management of the Executive Office of the President, a War Production Board, and at the head of that Board appointed a chairman whom he empowered, with the advice and assistance of the members of the Board, to exercise general direction of the War Procurement and Production Program. And the War Production Board and the Office of Price Administration, by their joint declaration, in the exercise of the powers of the President so conferred upon them, defined copper, lead and zinc as strategic materials essential to the prosecution of the war.

On January 30, 1942, the Emergency Price Control Act of 1942 became law (ch. 25, 56 Stat. 23; 50 U. S. C. App. 901 to 946, pp. 313 to 349) and its Administrator was thereby empowered on behalf of the United States in such manner and upon such terms and conditions as he should determine to be necessary to obtain the maximum necessary production of any commodity, to make subsidy payments to domestic producers of such commodities in such amounts and in such manner and upon such terms and conditions as he should determine to be necessary to obtain such maximum necessary production thereof, provided that in the case of any commodity which had theretofore been or might thereafter be defined as strategic or critical by the President pursuant to Section 5d of the Reconstruction

Finance Corporation Act (15 U. S. C. A. s. 606b) as amended, such determination should be made by the Federal Loan Administrator with the President's approval, and such subsidy payments to domestic producers might be made only by corporations created or organized pursuant to Section 5d. Accordingly, the Reconstruction Finance Corporation caused to be created as such agency of the United States a corporation known as Metals Reserve Company, and that company at all times since has served in that capacity. And the President of the United States made his Executive Order No. 9250 as amended by his Executive Order No. 9381 (50 U. S. C. Appendix, p. 314, Title V, at p. 316), and pursuant to the authority conferred upon him by the Emergency Price Control Act of 1942 created the Office of Economic Stabilization, and at the head of that office he established an Economic Stabilization Director, and authorized that Director to direct Metals Reserve Company to use its authority to subsidize, were such measure necessary to insure the maximum necessary production of any commodity.

It being found that under the established price ceilings, costs to be encountered in the production of copper, lead and zinc and other metals essential to the successful prosecution of the war were too high to insure the maximum necessary production required for armament and other purposes of war, and copper, lead and zinc in such maximum necessary production being defined as indispensable and strategic material for that purpose, and stimulation of production of those metals being imperative and being possible by payment of a subsidy for such *increased* produc-

tion, the National Government, impelled by the exigencies of war, paid and pays subsidies for production of these metals in excess of quotas established jointly by the War Production Board and the Office of Price Administration. The subsidies were and are being paid by order of the Office of Price Administration dated February 9, 1942, No. P. M. 2458, and pursuant to that order, commencing February 1, 1942, Metals Reserve Company has paid a subsidy for production, over and above fixed quotas of 5c per pound for copper, 2¾c per pound for zinc, and 2¾c per pound for lead.

The cases here consolidated for presentation on appeal were tried before the lower court, as has above been indicated, upon a stipulation of facts. Among the facts stipulated to between the parties but omitted from Appellants' "Statement" are the following:

> (a) "That none of the ore or metals produced from any mine of any plaintiff during said calendar year 1943 was sold by any plaintiff to the United States Government or to Metals Reserve Company or to any other agency of the United States Government, but was sold to other purchasers." (R. p. 32.)
>
> (b) "That the sole controversy now remaining between the parties and the sole matter in issue to be submitted to and determined by the Court in each of said pending cases is whether or not, under the stipulated facts and pertinent statutory and and constitutional provisions, the payments made to plaintiff therein by Metals Reserve Company were a part of the gross amount received for, or the gross value of metalliferous ore sold and were lawfully considered and treated as such part in making the assessment and tax levy complained of." (R. p. 32.)

(c) Subsidies paid by Metals Reserve Company were not paid upon all ore produced by Respondents but only upon production in excess of established quotas for the respective mines, (R. p. 47) and payments varied, certain Respondents receiving additional premiums where it appeared that the initial premiums offered for production in excess of established quotas were not sufficient to permit of increased production of copper, lead or zinc and that substantial expenditures were required for greatly increased development work and rehabilitation of underground workings or additional facilities.

(d) "Metals Reserve Company does not purchase the ores on account of the production of which it pays premiums to the producer; they are not taken into account in tariffs filed by railways and approved by the Interstate Commerce Commission or Public Service Commission fixing freight rates on ores or concentrates and predicated primarily on metal value content; smelting companies may not participate in such premium payments even though their normal charges be based upon a sliding scale dependent upon the value of the metal content of ores." (R. p. 61.)

(e) That in certain instances subsidy payments were made by Metals Reserve Company to the producer in advance of the sale of ores or metals recovered from the ores, while in other instances such payments were made after the sale of the ores. In no instance did it appear that subsidy payments were or could have been made at the time of the sale of ores by the producer to the smelters or other purchaser. (R. pp. 61-62.)

(f) That (R. p. 63) the mining companies caused to be prepared and submitted to Metals Reserve Company a memorandum respecting the

inclusion of premium payments in "net proceeds" and in "Mine Occupation Tax." After examining such memorandum a letter was written by the President of Metals Reserve Company to Mr. F. S. Mulock (General Manager, United States Smelting Refining and Mining Company). Such memorandum and letter were upon proper identification, received in evidence by the Commission, but it was agreed that the Commission should not be bound by the inferences or conclusions therein stated; in that letter the President of the Metals Reserve Company said, "* * *, the statements in the memorandum with respect to premium payments by Metals Reserve Company, beginning with the final paragraph on page 2 and continuing to the end of the memorandum, are in our opinion, factually true and correct." (R. 64.)

The statements contained in the memorandum and so referred to as being factually true and correct are as follows:

"Premium payments made by Metals Reserve Company are not payments made by that Company or received by the Mining Company for the sale or conversion into money or its equivalent of any ores:

"Such premium payments are not realized from a sale; they are not paid by a purchaser (Metals Reserve Company does not purchase the ores upon account of which it makes premium payments); they are not paid at the time of a sale, nor are they based upon recoverable metals or actual recoveries at any particular concentrator or smelter, nor upon the terms of private settlement contracts; they are specifically exempted from the Excess Profits Tax; they are not taken into account in tariffs filed by railways and approved by the Interstate Commerce Commission or Public Service Commission fixing freight rates on ores or concentrates and predicated

primarily on metal value content; smelters may not participate in such payments even though their normal charges be based upon a sliding scale dependent upon value of metal contents.

"The announced purpose of premium payments was 'to expand output of copper, lead and zinc because of their importance in the production of armaments', '* * * to compensate operators for extra costs involved for bringing out additional metal output,' '* * * to make it possible quickly to increase production by mining low grade sub-marginal ores and to develop additional ore reserves.' (See OPA Release, February 9, 1942.)

"Such purpose is emphasized by the order freezing royalties and prohibiting diversion of any part of "B" and "C" quotas,—it being said that diversion of such added premiums into increased royalties to landowners would be 'an unwarranted expenditure of public funds which can contribute nothing to further production.'

"To the extent that any portion of such premiums are taken by a state on account of a property tax, the purpose of Metals Reserve Company in paying the same would be defeated and such funds be diverted from the use in the production of ores to a contribution to the support of state or local government." (R. pp. 66-67.)

II

ARGUMENT

1. *The Subsidy or Premium Payments Received by Respondents From Metals Reserve Company were No Part of the "Gross Amount Received For, Or Gross Value of Metalliferous Ore Sold."*

Obviously the power to levy an occupation tax can only be exercised pursuant to an Act of the Legislature clearly prescribing the tax and a yardstick for determining its amount. If the yardstick employed is unsuitable, unfair or otherwise imperfect, the fault lies with the Legislature and cannot be corrected by the executive or judicial departments. A fairly wide discretion in selecting the yardstick is vested in the Legislature. In various states the occupation tax is determined from "Income," "Volume of Business Done," "Gross Earnings," "Gross Sales," etc. Occasionally the selected yardstick has been rejected by the courts as inappropriate. In such case the sole remedy has been and is a new and lawful statute supplied by the Legislature and not by a taxing agency of the executive department.

At the top of page 3 of their brief, appellants correctly quote a *portion* of Section 80-5-66, Utah Code Annotated, 1943, wherein it is provided that the occupation tax levied shall be "equal to one per cent of the gross amount received for, or the gross value of, metalliferous ore sold" during the calendar year then next preceding.

Even if the quoted excerpt contained all of the provisions of the section relating to the prescribed yardstick or pertinent to the question here presented for decision, it seems to us perfectly clear that the judgment of the trial court must be affirmed. Throughout Appellants' arguments the significance of the word "sold" appearing in the quoted excerpt, is ignored. Were it assumed as contended by Appellants that the yardstick should have been "Income" or "Gross Proceeds" or "Gross Receipts" from any source,

the inescapable fact remains that the legislative department decreed otherwise in the *quoted* excerpt, even without the aid of the *unquoted* provisions of the section, which the Appellants have entirely disregarded.

When the Legislature says in the quoted excerpt that the tax shall be "equal to one per cent of the gross amount received for, or the gross value of, metalliferous ore *sold*" it seems to us unmistakable that the levy must either be "one per cent of the gross amount received" under a bona fide contract for the "metalliferous ore *sold*" or "one per cent of the gross value of metalliferous ore *sold*." But were there any possible ambiguity in the quoted excerpt as to the yardstick to be applied the ambiguity is conclusively dispelled by the portion of the section which appellants failed to quote but which we quote in our statement of facts and here repeat for convenience.

> "The basis for computing the occupation tax imposed by this act for any year shall be as follows:
>
> (a) If the ore or metals extracted is sold under a bona fide contract of sale the amount of money or its equivalent actually received by the owner, lessee, contractor or other person operating the mine or mining claim from the sale of all ores or metals during the calendar year less a reasonable cost, if any, of transporting the ore from the place where mined to the place where, under the contract of sale, the ore is to be delivered.
>
> (b) If the extracted ore is treated at a mill, smelter or reduction works which receives ores from independent sources and which is owned or controlled by the same interests owning or controlling the mine or mining claim, such disposal shall be

> treated as a sale within the meaning of this section for the purpose of determining gross proceeds or otherwise, and in such determination a rate or charge for sampling, assaying, milling and smelting the ores and extracting the metals and minerals therefrom shall be deducted which shall not exceed an amount to be determined by applying the same rates as are applied by such mill, smelter, or reduction works or competing works, to ores of substantially like character and in like quantities received from independent sources."

There is no contention here that sales of ore were made other than bona fide and no contention that any erroneous computation was made with respect to the sale of the ores the determination of the value of which is covered by subdivisions (a) and (b) of the statute above quoted.

There is nothing unconstitutional or otherwise unlawful in the express mandate of the Legislature prescribing the basis for computing the occupation tax which is to be paid. The prescribed methods of computing the tax are not given in the statute by way of example but are exclusive and conclusive.

In view of the fact that it is here stipulated that "Metals Reserve Company does not purchase the ores on account of the production of which it pays premiums to the producer" it is not only difficult but impossible to understand how the premium or subsidy payments could be properly included in "the amount of money or its equivalent actually received * * * from the sale of * * * ore or metals * * *."

In an effort seemingly to bring the subsidy payments within the purview of the mining occupation tax statute, Appellants imply that the subsidy payments made by Metals Reserve Company were made as, and were, part of the purchase price for which the metals were sold. The trouble with that contention is that it has no basis in fact. Metals Reserve Company made the subsidy payments, but it neither bought the ores nor did it have a contract to buy them, nor did it acquire any interest in the ores or metals sold. It did not pay any part of the purchase price of the ores or metals sold. The consideration for the sale of the ores and metals was paid by the purchasers and no one else, and was paid at or about the time of sale which bore no relation whatever to the payment of the subsidies. Subsidy payments were received by the smelters as agents for the Metals Reserve Company and were distributed to the producer, sometimes before and sometimes after the purchase of the ores and payment therefor, but never contemporaneously therewith, and in many cases not by the same smelter that purchased all of the producer's ores.

The ceiling prices constitute the sole consideration paid by the purchasers for all ores or metal sold, and the producers are denied by law the right to sell or offer to sell buy, or offer to buy, or to accept, delivery of copper, lead or zinc at prices higher than the stated maximums of 12c per pound for copper, 6.5c per pound for lead and 8.25c per pound for zinc. (Executive Order No. 8734 as amended by Executive Order No. 8875 Vol. 9. U. S. Cong. Serv. 1941, pp. 852,867; Rec. pp. 39, 40, 42 and 43.)

While railroad freight rates are based on the value of ore shipped it is stipulated herein (R. p. 61) that subsidy payments are never included in determination of the value upon which the freight rates are based; nor may smelting companies participate in such premium payments even though their charges are based upon a sliding scale dependent upon the metal value of the ores (R. 61).

There is a fundamental distinction between proceeds realized from a sale of ore and a subsidy paid by the Government for over-quota production. The difference is not of degree but of character and purpose. Bouvier defines a sale as "an agreement by which one of two contracting parties, called the seller, gives the thing and passes the title to it, in exchange for a certain price in current money, to the other party, who is called the buyer or purchaser, who, on his part, agrees to pay such price."

We have substantially the same definition in Title 81, Utah Code Annotated 1943, which deals with "Sales." There must be a seller and a buyer. The buyer is the one who receives the goods and is bound to pay the price.

Subsidies or bounties have nothing to do with the value of the goods produced or the services performed. They are given purely and simply for the promotion of the public welfare.

The bounty paid for the killing of a wolf or a coyote has nothing to do with the market price of the hide. The value of the article produced and the bounty paid for its production are two separate and distinct things. So in this case the subsidy or bounty paid by the government is paid

without regard to the intrinsic value of the metals. It is paid because the exigencies of war demand it, that there may be brought into existence in sufficient quantities metals that are critically essential to the prosecution of the war.

Different operators not only have been assigned different quotas on the same metals, thus establishing a variety of bases upon which the subsidies are paid, but the subsidies themselves vary in amount, being A or A and B or A, B and C subsidies according to the circumstances peculiar to each producer. Thus were the subsidy payments to be included as a part of the receipts from sales or as a part of the value of the ores or metals sold, there would be almost as many sales prices or values for the same metals sold as there would be producers. An utter lack of uniformity or equality would prevail, for though two operators produce identical quantities of the same metal, sell it on the open market for an identical sum, one, because of the difference in quotas, or the class of subsidies assigned, or both, would be called upon to pay a tax and the other not, or the rate of taxation would differ between them, although the product sold were identical, an incongruous situation to result from application of a fiction not within contemplation of the mining occupation tax of Utah.

To permit the construction contended for by appellants the mandate of the Utah statute that the occupation tax levied shall be "equal to one per cent of the gross amount received for, or the gross value of, metalliferous ore sold" must be supplemented so that the required levy shall be "equal to one per cent of the gross amount received for,

or the gross value of, metalliferous ore sold, *plus one per cent of any subsidies paid by the United States Government for producing metals vital to the war effort in excess of a fixed quota.*" The fact that when the statute was enacted there were no quotas, no subsidy payments, and not even a war does not seem to trouble appellants in arriving at their conclusion that the Legislature clearly read the future and had especially in mind the levy of an occupation tax on any rewards for extra effort that might be offered by the Government during times of national peril.

It must always be kept in mind that the tax here in question is an *occupation* tax—not an *income* tax. Each respondent has already made full payment of its income tax. In arriving at the amount of such tax all subsidy payments received by any respondent were properly included as a part of its income.

In the suits at bar it would appear unnecessary to call attention to the elementary principle stated in *United States* v. *Merriam,* 263 U. S. 179, 44 S. C. 69, 68 L. Ed. 240, that:

> "—in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer.——"
>
> *Miller* v. *Standard Nut Margarine Co.,* 284 U. S. 498, 52 S. C. 260, 76 L. Ed. 422;
>
> *Gould* v. *Gould,* 245 U. S. 151, 38 S. C. 53, 62 L. Ed. 211.

The Supreme Court of Utah enunciated the same principle with equal clarity in *Norville* v. *State Tax Commission,* 98 Utah 170, 97 P. (2d) 937, 126 A. L. R. 1318, as follows:

> "—in seeking to give effect to the intent of the legislature the court will adopt that interpretation of a taxing statute which lays the tax burden uniformly on all standing in the same degree with relation to the tax adopted. ——And will avoid an interpretation which would lead to an impractical, unfair, or unreasonable result. ——"

The doctrine that taxing statutes are, in case of doubt as to the intention of the legislature, to be construed strictly against the taxing authority and in favor of those on whom the tax is levied, has been well set out in the case of *Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84, 55 S. Ct. 50, 79 L. Ed. 211. See, also, *Los Angeles & S. L. R. Co.* v. *Richards,* 52 Utah 1, 172 P. 474; *W. F. Jensen Candy Co.* v. *State Tax Commission,* 90 Utah 359, 61 P. 2d 629, 107 A. L. R. 261; 25 R. C. L. Sec. 307 at p. 1092; Cooley on Taxation, Vol. 11, 4th Ed. Sec. 503 at p. 1113.

Under the statutes and authorities and on every basis of reason and logic, it is submitted that the subsidies are bonuses paid by the United States as a bounty to encourage production of copper, lead and zinc, and may not be considered as a part of the gross amount received for, or the gross value of, ores sold.

Appellants in their brief have erroneously made certain statements to which we wish here to call attention. At the bottom of page 8, it is stated that the producer

would receive the ceiling price for their ores from the smelters to which they were shipped and at the same time would receive from Metals Reserve Company from the very same smelter the premium payments for their ores produced in excess of his quota. As stipulated, such payments were not made at the same time and frequently not by the same smelter. Where a producer shipped all ores to one smelter, premium payments were made through that smelter, but where a producer shipped to more than one smelter he selected the smelter through which he would receive premium payments.

At page 10, under paragraph numbered 9, it is stated that in order to relieve the mining companies from the provisions of the ceiling price schedules, the Office of Price Administration issued its supplementary regulation No. 4, exempting from such ceiling prices, sales or deliveries of copper, lead or zinc to Metals Reserve Company or to its duly authorized agent or agents, pursuant to the premium price plan. It is not clear whether Appellants intend to suggest that this order permitted smelting companies individually purchasing copper, lead or zinc to pay more than the ceiling price for such metals because they had been designated by Metals Reserve Company as its agents for certain purposes but not for the purpose of purchasing such ores or whether this statement is made for some other purpose. In any event it has been stipulated as herein shown that the ores were sold at the ceiling prices, were sold to the smelters and that the subsidy payments came from the Metals Reserve Company which did not purchase the ores.

At page 20 it is stated that the smelters are made the agents of the Federal Government for the purpose of receiving the ores and paying the premium prices and that the producers are required to dispose of the ores at the designated smelters before the premium prices will be paid. The smelters are not designated as agents for the purpose of receiving ores and the producers were not required to dispose of their ores to any designated smelters. The producer selects the smelters to which he wishes to ship and when he ships to more than one smelter designates through which smelter he will receive premiums from Metals Reserve Company. The purpose of this requirement by Metals Reserve Company was obviously to avoid the possibility of duplication in premium payments.

At pages 12, 28, 29 and elsewhere in their brief Appellants state that it was held by the trial court and that it has been urged by Respondents that the subsidy payments were mere gifts. The court made no such statement, nor is it anywhere urged by Respondents. This statement is apparently made by Appellants for the purpose of tying their argument to certain income tax cases cited by them in which it has been held that receipts claimed by taxpayers to be gifts were nevertheless income under the income tax statutes. Those cases are irrelevant here since we are not concerned with income but with an occupation tax the basis of computing which is specifically provided for in the Act which creates the tax.

The case of *Vause etc.* v. *McKibbin,* 39 N. E. (2d) 1006 referred to by Appellants at pages 13 to 16 of their brief

is irrelevant. That case involved a retail sales tax based upon "Gross Receipts" and it was held that the retailer must pay his tax upon $1.03 where he priced the article at $1.00 but received in payment therefor $1.03, the additional 3c being designated, as between the retailer and consumer, a payment of tax. Our court in the case of *Dupler Art Furs* v. *State Tax Commission,* —— Utah ——, 161 P. (2d) 788, has just held the opposite under our sales tax act which defines purchase price as the price to the consumer, exclusive of tax. In that case Judge Larson said "I concur in the holding that the term 'purchase price' upon which our state sales tax is computed, is the price the purchaser pays not including the said luxury tax. In other words the Federal luxury tax is excluded from the purchase price in computing the state sales tax."

The Minnesota case of *State* v. *Armson,* —— Minn. —— 207 N. W. 732, relied on by Appellants, involved an occupation tax statute where the purchaser paid in advance of delivery and took a discount. The Court held that the discount represented interest on money paid before it was due rather than an allowance on the purchase price.

The cases of *Mercur Gold Mining Company* v. *Spry,* 16 Utah 222, 52 Pac. 352 and *Salt Lake County* v. *Utah Copper Company,* 294 Fed. 199, cited at page 17 of Appellants' brief did not involve the statute or the problem presented here and are irrelevant, and as stated, supra, if our statute used the words "gross income," "gross earnings" or other phrases such as those relied upon by Appellants but different from those actually used, or if an income tax prob-

lem was involved, the other cases relied upon by Appellants might be enlightening.

The only case in which the problem here presented has come before a court of last resort in any state is the case of *Klies* v. *Linnane* (*Mont.*) decided February 26, 1945, and reported at 156 P. (2d) 183 wherein the Montana Supreme Court held that subsidies identical with those here involved were not properly to be included in the "gross value" of the miner's product to arrive at the valuation of net proceeds of mines for the purpose of taxation, saying, (156 P. (2d) 185) :

> "(1) It is, therefore, clear that in the determination of the 'valuation of the net proceeds of such mines and mining claims for the purpose of taxation,' S. 2091, Revised Codes, the gross value of the product, which is the basis for computation, is the money which the producer received or should properly have received upon the bona fide sale of his product. The question here is whether the premium or bonus received from the government, which was not the purchaser of the ores or metals, should be considered as constituting a part of the gross value, or of the proceeds of bona fide sale, of plaintiff's products.
>
> "Title 50 U. S. C. A. Appendix S 902 (e), which is a part of the Emergency Price Control Act, provides: 'Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, * * * make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to

obtain the maximum necessary production thereof: Provided, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act (section 609j of Title 15) as amended, such determinations shall be made by the Federal Loan Administrator, with the approval of the President, and notwithstanding any other provision of this Act (sections 901-946 of this Appendix) or of any existing law * * * such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d (section 609j of Title 15); * * *"

"(2) The Metals Reserve Company was created for the purposes mentioned in those federal acts. It encourages the increased production of strategic metals, including lead and zinc, by paying the producer a premium or bonus for such production in excess of a quota fixed by it for that producer. In this connection two points should be noted. The Metals Reserve Company does not thereby increase the price of the metal, or the amount to be paid by the purchaser for the metal; nor does it pay the premium or bonus upon all the production, but only upon the production in excess of the defined quota. Thus, as intended by the federal statute, it is not production, but increased production, which is encouraged.

"Webster's New International Dictionary defines 'bonus' as a 'subsidy to an industry from a government.' It defines 'sudsidy' as a 'grant of funds or property from a government, * * * to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public.' It is an artificial way of encouraging an

industry or enterprise otherwise than by increasing the value of its product.

"It is apparent that under natural economic laws the production of lead and zinc ores, as well as of other products, automatically results whenever economically practicable, and that it cannot ordinarily result unless so. Production not otherwise practicable may artificially be made so, either by increasing the price of the product, or by rewarding the production otherwise, as by subsidy or bonus payment. An essential difference between the two methods is that a direct price increase ordinarily not only rewards and thus encourages additional production, but also makes more profitable the production which would have existed without it; on the other hand, the subsidy or bonus method can more practicably be limited in application to the additional production. Either method would tend to increase the production of strategic metals for war purposes by making profitable an enterprise which otherwise could not pay its way, and, therefore, could not operate. Both methods increase the proceeds, and therefore the value of the enterprise by making it profitable, but only the price rise method increases the value of the product. Thus they are similar only in increasing the income from, and the value of the enterprise.

"(3) Defendant argues in his brief that 'although the premium or bonus is paid as an inducement to increase production of strategic metals, its effect is to increase the value of such metals to plaintiffs.' But its effect is not to increase the value of the metals to plaintiffs or anyone else, for it does not change the prices at which they are bought and sold. Defendant fails to distinguish between the enterprise, the profits and value of which are increased by the bonus or subsidy, and the product

itself, the value of which is not thus increased. The killing of bear for bearskins and the production of beets for sugar may not be profitable enterprises. They may be made profitable by a bounty on the killing of bear or the raising of beets, but it cannot be said that such bounty increases the value of the bearskins or the sugar. It is the enterprise, not the product, which has been increased in value. But the tax upon the net proceeds of mines is not based upon the value of the enterprise, nor upon all possible income therefrom. It is based only upon the net value of the ores produced. Income in addition to that received as the net value of the product may perhaps be taxable as income, but it is clearly not taxable as 'net proceeds of mines' which the statute identifies as the net value of the product and bases upon the gross proceeds of its bona fide sale.

"Webster's New International Dictionary defines 'value' as a 'fair return in money, goods, services, etc., for something exchanged; that which is considered an equivalent in worth; * * * monetary worth of a thing, marketable price; also, worth as estimated in terms of a currency or of another medium of exchange.'

"A further examination of the premium or bonus system employed demonstrates the fallacy of defendant's argument that it is the value of the product which is increased. The Metals Reserve Company has instituted a double premium for zinc production. Under it the normal quota may reflect a normal price of 11c per pound. A certain excess production may receive a bonus of 2¾c per pound, while still further excess production may receive an additional bonus of that amount. Thus the zinc production of a certain mine, all of which is sold on the market at its value of approximately 11c per

pound, may under the quota system be additionally rewarded by a bonus of 2¾c per pound upon part of the excess and by a bonus of 5½c per pound upon the remainder. But can it be said that this zinc, all of it precisely the same, varies in value so that some of it is worth 11c, some 13¾c, and some 16½c per pound? Obviously, the increase, is not in the value of the product but in the income, profitableness and value of the enterprise, upon which the tax in question is not based. The additional income is from a collateral or additional source, not included in the tax base.

"Defendant argues further that the premium or bonus plan is part of the emergency price control system, that the effect of that system is to prevent the ascertainment of value in a free market, and that the bonus, together with the sale price, should therefore be considered as the equivalent of that value. But, as noted above, the value, however fixed, is the price paid and received for the metal, and other reward, incentives or incidental income are not part of that value; they are therefore not part of the tax base.

"Defendant cites section 1996, subdivision 5, which defines both 'value' and 'full cash value' as meaning for taxation purposes 'the amount at which the property would be taken in payment of a just debt due from a solvent debtor,' and asks: 'Would anybody seriously assert that if plaintiffs in this case had owed a creditor $217,876.68 that creditor would not have been eager and willing to take plaintiffs' total production of metals, including zinc and lead, for what they could be sold for in the market plus the bonus which the Metals Reserve Company was willing to pay as a bonus or premium for producing them?' The question must be answered con-

> trary to defendants' apparent view for the Metals Reserve Company would not pay the bonus to the creditor or other purchaser, but only to the producer.
>
> "It is apparent, therefore, that the premium or bonus paid by the government, not as part of a purchase price for the product, but as an inducement for its production, is not a part of the value of the product."

Appellants in their brief on page 36 attempt very briefly to distinguish the Montana statutes involved in the case of *Klies* v. *Linnane*, and then divert to refer to a Montana Occupation tax statute which wasn't involved in that case.

As a matter of fact the Montana statutes involved in the Klies case were conceivably susceptible of the interpretation which Appellants are asking the Court to place on our occupation tax statute, for although the language of the Montana provisions was properly construed in the Klies case as meaning what is espressly stated in the pertinent provisions of the Utah statute, the language there employed might by some stretch of the imagination make plausible a contention that subsidy payments were there intended to be included and treated as a part of the net annual proceeds of Montana mines. Under Sections 2089 and 2090 of the Montana Code, the mine owner is required to report "the gross yield" from his mine, and "the gross yield or value in dollars and cents" less specified deductions determines the assessment upon which the tax levy must rest. Unlike the Utah statute, the assessment is not expressly and unmistakably based upon and tied to the "gross

amount received for or the gross value of metalliferous ore *sold.*" The Montana statute, unlike the Utah statute, does not expressly say that the "gross yield" of minerals produced shall be confined to "the gross amount received for or the gross value of metalliferous ore sold" and does not thus expressly exclude any "yield" or income derived from other sources than a *"sale."* In holding that the Montana statutes necessarily imply what the Utah statutes expressly provide, the Supreme Court of that State merely adopted a commonsense construction of what must have been intended by the Montana Legislature. The Utah statutes leave no possible room for a contention like that unsuccessfully urged by the Montana County Treasurer.

With reference to Appellants' argument that the value of the product was increased because of subsidy payments, the decision of the Montana Court as above set out is pertinent. Moreover the ancient law of supply and demand still operates. Under that law the "value" of bear skins, metals, or of any other property cannot be increased by increasing the supply. The rule holds good in times of depression, in war or in peace. The announced purpose and the achieved purpose of the subsidy program was to increase the supply of metals vital to the war. What might have been the sale price or value of the metals in the absence of a ceiling price is problematical. What was the value and the top sale price of the metals involves no possible uncertainty. Under the stipulated facts and pursuant to valid contracts of sale, each Respondent sold its metals at the top price.

The weakness of a contention that subsidy payments had any relationship to value is apparent from the fact that a pound of lead, copper or zinc produced by a Respondent before it had exceeded its quota and another pound of the same metal produced after it had exceeded its quota would be identical in weight, kind and character and on any market would necessarily sell for the same price and be of identical value.

At page 29 of their brief Appellants accurately state with reference to the nature of the subsidies:

> "The *quid pro quo* for which such premium payments were made, was the actual production of the various metals * * *."

The concluding part of the sentence that said production was "for the Federal Government in the prosecution of the war" may be true in part. Although the record is silent as to the ultimate consumer of any products sold by any Respondent, that consumer may in some instances have been a government agency. But regardless of who may have received all or any part of any ore or metals sold, appellants necessarily deny their contention that the premium payments were a part "of the gross amount received for or the gross value of the metalliferous ore sold" when they say on page 29 of their brief, as to the nature of these payments:

> "The premium payments were made for production of ore * * *."

If and when the Government or one of its agencies

received and used for the war effort a quantity of metal produced by a Respondent on a portion of which premium payments had been made and on the remainder of which no premium payment had been made because Respondent has not then exceeded his quota, pursuant to what definition of value and by what process of reasoning would anyone say that a pound of metal for the production of which no premium had been paid had a different or a less value than an identical pound of the same metal produced after Respondent had exceeded its quota?

2. *The Exaction of the Tax Herein Complained of was a Direct and Unconstitutional Interference with and Burden upon the Functions of the National Government.*

In view of the statute and the stipulated facts, we see no occasion to impose upon the time of the court with a detailed discussion of constitutional questions; nevertheless to permit the state to take under the occupation tax any part of the premium payments made by Metals Reserve Company would constitute a direct and unlawful burden upon the National Government. As indicated above the chairman of Metals Reserve Company approved the statement that "To the extent that any portion of such premiums are taken by a state on account of a property tax the purpose of Metals Reserve Company in paying the same would be defeated and such funds be diverted from use in the production of ores to a contribution to the support of state or local government."

"A state cannot interfere with the free and unembarassed exercise by the Federal government of all power conferred upon it." 51 Am. Juris., Taxation, Sec. 218, p. 279; 11 Am. Juris., p. 870, Constitutional Law, Section 174.

"It necessarily follows that a state and the subordinate taxing units thereof are without power to subject to taxation the property of the Federal government or the means, instrumentalities and agencies thereof which it employs to carry out its proper functions, unless Congress expressly confers a right upon the states to tax such agencies, instrumentalities or property." 51 Am. Juris., p. 279, Taxation, Sec. 218.

"The state may not burden or interfere with the exercise of national power or make it a source of revenue, or tax things sold, or tax the means used, for the performance of federal functions." 51 Am. Juris., p. 279, Taxation, Sec. 218.

The tax is neither indirect nor remote. It is a reduction by the state of the special allowances Congress has directed to be paid to successfully conduct a war.

The doctrine upon this subject originates from the decision of the Supreme Court of the United States in *McCulloch* v. *State of Maryland, et al.*, 17 U. S. 159, 4 Wheat. 316, 4 L. Ed. 579. Chief Justice Marshall in the opinion said:

> "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those *means*

> which are employed by congress to carry into execution powers conferred on that body by the people of the United States?"

Appellants rely upon such cases as:

> *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155; and *Alabama* v. *King and Boozer*, 314 U. S. 1, 86 L. Ed. 3,

which were efforts to tax private property of an individual as salary, contractor's profits, or the like. But this is not such a case. The effort here is actually to take away a part of these special allowances paid by the National Government to further the prosecution of the war. The tax involved in the suit at bar falls directly and immediately upon an operation of the National Government, and upon the very means employed by the National Government for the exercise of its powers.

As stated by Mr. Justice Holmes in *Johnson* v. *Maryland*, 254 U. S. 51, 55; 41 S. Ct. 16; 65 L. Ed. 126, 128:

> "With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. Ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law today."

III

CONCLUSION

The application of Section 80-5-66 Utah Code Annotated 1943, to the facts stipulated herein clearly makes the consideration of other contentions or arguments unnecessary. That statute not only levies the tax but definitely and precisely prescribes the yardstick by which the amount of the tax is to be measured.

The decision of the trial court should be affirmed.

Respectfully submitted,

H. VAN DAM,
Attorney for Respondent, Combined Metals Reduction Company.

CHENEY, JENSEN, MARR & WILKINS,
Attorneys for Respondents, Chief Consolidated Mining Company, Montana Bingham Consolidated Mining Company, United States Smelting, Refining and Mining Company.

FARNSWORTH & VAN COTT,
Attorneys for Respondents, Eureka Bullion Mining Company, International Smelting and Refining Company, National Tunnel & Mines Company, Ohio Copper Company of Utah.

INGEBRETSEN, RAY, RAWLINS & CHRISTENSEN,
Attorneys for Respondents, Eureka Lilly Consolidated Mining Company, Tintic Standard Mining Company, Colorado Consolidated Mining Company.